Supreme Court, U.S.
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No. 97-891

In The

Supreme Court of the United States

October Term, 1997

SHEETZ, INC.,

Petitioner,

vs.

CHERYL L. VANDEVENDER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner fails in its obligation to set forth that which is essential to a ready and adequate understanding of the points requiring consideration. Specifically, petitioner does not and cannot show that the federal questions it now seeks to present were raised and passed upon by the court of first instance and in the appellate court. Supreme Court Rule 14(1)(g)(i).

On December 1, 1994, Cheryl Vandevender instituted suit against Sheetz, Inc. and her former manager, Karen Foltz, alleging that defendants discriminated against her in the course of her employment and attempts at re-employment on the basis of her workplace injury in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq.*, and the West Virginia Workers Compensation Act, W. Va. Code § 23-5A-1, *et seq.*

Respondent expressly sought recovery for punitive damages in her complaint and amended complaint.[1] Despite twice having the opportunity to answer, the petitioner did not assert any affirmative constitutional defense to punitive damages, did not move for dismissal of the punitive damage claim, did not move for summary judgment, did not seek to bifurcate issues of liability and punitive damages, and did not move for directed verdict at any stage of the trial seeking dismissal of the punitive damages claim. *See, e.g.* directed verdict motion (9/13/95 Tr. at 53, Respondent's App. A); renewal of directed verdict motion (9/13/95 Tr. at 188, Respondent's App. B).

Post-trial, respondent submitted proposed findings of fact which the trial court substantially adopted in its review affirming the punitive damage awards. Petitioner's App. B. Although

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1. An amended complaint was filed alleging retaliation based upon events that occurred when Mrs. Vandevender returned to employment following counsel's demand for re-employment.

petitioner had the opportunity, it apparently chose not to submit proposed findings of fact and requested no hearing upon the facts as presented by respondent. Thus, petitioner abandoned its right to participate in trial court level review of the punitive damage awards.

The trial court's findings of fact were then reviewed by the West Virginia Supreme Court of Appeals under a deferential standard of review. Under that standard the more "fact dominated" the issue, the more deference is extended to the lower court unless it is shown that the findings of facts are clearly erroneous. *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 106 (1995). *See also Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E. 2d 489, 493 (W. Va. 1996) (the Supreme Court of Appeals will disturb only those factual findings that strike us wrong with the 'force of a five-week-old, unrefrigerated, dead fish'). Petitioner did not challenge the trial court's findings of fact as being clearly erroneous and thus again abandoned the review process. The West Virginia Supreme Court issued a *per curiam* opinion[2] reducing the punitive damages awarded under Count I and affirming the punitive damages awarded under Count II.

In the court of first instance, the scant record developed by petitioner and upon which petitioner must now rely in seeking further review by this Court of the punitive damages awarded is as follows. Petitioner stated as its objection to punitive damages evidence during the trial: "[Punitive damages] was objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury." (9/14/95 Tr. at 80, Respondent's App. C). In seeking a new trial, petitioner argued,

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2. Per curiam decisions in West Virginia "are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta." *Lieving v. Hadley*, 188 W. Va. 197, 201, n.4, 423 S.E. 2d 600, 604, n.4 (1992).

without particularity, that the evidence to support an award of punitive damages was insufficient and that punitive damages were inappropriate because of the recovery of compensatory non-economic damages, nothing more. (Defendant Sheetz, Inc.'s Motion for Judgment Notwithstanding the Verdict and/or for a New Trial and/or Remittitur and Memorandum in Support Thereof, pp. 19-21, App. D). In other words, the trial court was not presented with the federal question of notice now presented by petitioner's writ.[3]

With regard to petitioner's constitutional claim of excessiveness as measured against petitioner's wealth, the respondent offered an expert on the wealth of Sheetz without objection as to his qualifications or to his opinion. Petitioner did not call its own witness to interpret or explain the financial data that respondent presented to the jury. Instead, petitioner relied solely upon its cross-examination of respondent's expert and asked only one "meaningful" question about Sheetz's financial position:

> Now the total revenues that you have put up on the board, those don't mean profits? Those are not all the moneys that are available to Sheetz, what Sheetz has available to it to do whatever it wants to at their discretion?

(9/13/95 Tr. at 49, Respondent's App. E).

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3. In fact, the petitioner agreed to presenting the jury with a verdict form allowing the jury to consider the award of punitive damages for the first three counts and a separate award for the fourth count. In addition, the petitioner offered no objection to the substance of the jury instruction on punitive damages, thereby waiving any claim that the jury was improperly instructed as to whether to award punitive damages or on how to calculate punitive damages.

The petitioner then failed to make any argument in its "Motion for Judgment Notwithstanding the Verdict and/or for a New Trial and/or Remittitur and Memorandum in Support Thereof" as to why the petitioner believed the verdict to be excessive as measured by the wealth of the company. Thus, petitioner did not present the court of first instance with the federal question of excessiveness as measured against wealth now presented by petitioner's writ.

Petitioner now asserts as error that "the court also did not consider prior judicial decisions stating that punitive damages are not even available for Human Rights Act violations." Petition at 13. Petitioner suggests that the West Virginia Supreme Court of Appeals erred when it allowed punitive damages to stand under the West Virginia Human Rights Act. The West Virginia Supreme Court, in fact, rejected that very argument because petitioner failed to raise it at the trial court level. Petitioner's App. A, pp. 19-20. Moreover, the West Virginia Supreme Court expressly found, as a matter of state law, that petitioner's conduct permitted an award of punitive damages. Petitioner's App. A, pp. 20-23.

In sum, the record reflects that petitioner did not raise at trial or in its post trial motion the points on which it now seeks review. Before arguing that due process has been denied, petitioner must first show that it utilized the process available to it. The record reveals that petitioner failed to preserve that which it now claims as error.

REASONS FOR DENYING THE WRIT

I.

FAILURE TO PRESERVE ERROR

West Virginia maintains strict standards for preservation of error and development of a record for review. In *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W. Va. 223, 438 S.E. 2d 15 (1993), the court held that "when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Id.* 190 W. Va. at 226 [citations omitted]. *Whitlow* succinctly stated the basis for this rule:

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. Petitioner should have, but did not, raise the constitutional issues of notice and excessiveness as measured against wealth in the court of first instance.

After the jury returned its punitive damage awards, petitioner should have, but did not, engage in a *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897 (1991) review of those awards. Nonetheless, without participation by petitioner, the trial court made a *Garnes* analysis. *See* Petitioner's App. B.

Now, although the appellate court reviewed the punitive damage awards for excessiveness and expressly found that the trial court's review included each of the "guideposts" addressed in *BMW v. Gore*, 517 U.S. ___, 116 S. Ct. 1589 (1996) (Petitioner's App. A., p. 33), petitioner argues that, first, the trial court's review and, next, the appellate court's review violated its constitutional right to Due Process.

As a matter of West Virginia state law, a party who fails to invoke a *Garnes* review cannot then complain about the lack of Due Process. In *Horan v. Turnpike Ford, Inc.*, 189 W. Va. 621, 433 S.E. 2d 559 (1993), the West Virginia Supreme Court of Appeals held that "since the *Garnes* issue was not timely raised at the trial court level [by defendant], it is not controlling on appeal." *Id.*, at 626. In *Horan*, the appellant argued that the trial court did not follow *Garnes*. The *Horan* opinion notes that appellant did not offer a jury instruction based on *Garnes*, failed to object to the trial court's punitive instruction, withdrew its own punitive damage instruction in favor of appellee's instruction, and did not raise *Garnes* until the post-trial proceedings. The instant case is on all fours with *Horan* with the notable exception that, unlike the appellant in *Horan*, petitioner here did not even ask the trial court to undertake a *Garnes* analysis post-trial.

Petitioner was obligated under state law to address each *Garnes* factor with particularity in its Petition to the West Virginia Supreme Court of Appeals. Petitioner failed to do so. Petitioner's App. A, p. 26. *Garnes*, itself, addresses the standard for preserving error for review:

> In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of

> this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

Id., 186 W. Va. at 669.

Had petitioner addressed each and every factor set forth in *Garnes*, the West Virginia Supreme Court of Appeals would have reviewed the lower court's finding of facts under a clearly erroneous standard to determine whether, under the analysis contained in *Garnes* and *BMW*, the facts found by the trial court support the punitive damages awarded. Due to its failure to address the required factors at the state appellate level and because petitioner cannot now argue that the findings are clearly erroneous, petitioner has shifted its appeal strategy. Petitioner now asserts that the trial court's review was not meaningful and adequate and, therefore, should be set aside as a matter of law. In effect, the new argument by petitioner attempts to nullify the record and disregard West Virginia law requiring that error be preserved.

Petitioner argues that its right to Due Process under the Fourteenth Amendment was violated by the trial court's inadequate review of the punitive damage award under a *BMW* analysis. Obviously, the lower court could not have abused its discretion when petitioner either acquiesced or contributed to the alleged error by not seeking or participating in a meaningful due process review below. *See Maples v. West Virginia Department of Commerce*, 197 W. Va. 318, 475 S.E. 2d 410 (1996) (litigant may not silently acquiesce to error, and objections not made at trial will not be considered on appeal); *Smith v. Bechtold,* 190 W. Va. 315, 438 S.E. 2d 347 (1993) (inappropriate to grant relief to party who invites error in lower tribunal); *Interest of S.C.*, 168 W. Va. 366, 284 S.E. 2d 867 (1981) (a litigant may not actively contribute or silently acquiesce to

error and then raise that error as reason for reversal on appeal). Thus, in accordance with the rulings in *Whitlow* and *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W. Va. 643, 461 S.E. 2d 149 (1995) (failure to develop and preserve putative error below precludes review), petitioner has failed to preserve any error for appellate review.

II.

ADEQUACY OF TRIAL COURT REVIEW

Petitioner argues that *BMW* included a guidepost not previously addressed in the caselaw and that, therefore, the review by the trial court was inadequate: *i.e.*, lack of advance notice that the jury might be allowed to return a large award for punitive damages. However, the identical argument was rejected in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), where the appellant asserted that the procedure followed was "unconstitutionally vague" because *TXO* had no notice of the possibility of a such a large award of punitive damages. *TXO*, 509 U.S. at 463.

Petitioner argues that punitive damages are not recoverable under the West Virginia Human Rights Act or for retaliation against employees in violation of state public policy. Despite *TXO*'s admonishment concerning preservation of error, petitioner never preserved this argument by way of an affirmative defense, objections at trial, motion to dismiss, motion for summary judgment, motion for directed verdict or post-trial motion. Petitioner cannot excuse its failure to raise this issue by suggesting that notice is a new development in the caselaw following *BMW*. This factor was addressed in *TXO* and in *Garnes*. 186 W. Va. at 668. Thus, as the state appellate court found, that issue was waived by petitioner because it had not been presented to the trial court. Petitioner's App. A, pp. 19-20.

See also Garnes, 186 W. Va. at 669 (waived as a matter of state law); *Horan,* 189 W. Va. at 626 (*Garnes* issue not timely raised below is not controlling on appeal); *Browning Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-7 (1989) (Court refused to consider Due Process challenge to a punitive damage award which was not raised below).

Aside from the issue of petitioner's failure to preserve the "notice" argument, West Virginia has long recognized that bad conduct can lead to the award of punitive damages. In *TXO* the Court held that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *Id.* at 465-6 (citing *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 24, n.12 (1991)). The *TXO* Court further noted that prior law in West Virginia and elsewhere unquestionably placed appellant on notice that the bad conduct which formed the basis of the punitive damage award has its consequences. As the *TXO* Court recognized, West Virginia has long allowed for the recovery of punitive damages for egregious conduct. *Id.*

The principle that egregious conduct could lead to punitive damages was recently affirmed in *Alkire v. First National Bank*, 197 W. Va. 122, syl. pt. 4, 475 S.E. 2d 122 (1996), where the state court, quoting a one hundred year old case, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), again held that

> in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindicative damages; these terms being synonymous.

West Virginia has long recognized that punitive damages can be recovered for bad conduct associated with a wrongful termination. *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E. 2d 270 (1978); *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E. 2d 624 (1992); *see also Dobson v. Eastern Associated Coal Company*, 188 W. Va. 17, 422 S.E. 2d 494 (1992) (tort damages long recognized as recoverable for violations of the West Virginia Human Rights Act).[4] Petitioner had sufficient notice that punitive damages may be recoverable.

Next, petitioner argues that the amount of the award was too much when compared to the net worth of the company. Petitioner should not be heard to complain about the amount of the punitive damage awards in this case because it failed to diligently challenge these damages at trial. In *Pasquale v. Ohio Power Company*, 187 W. Va. 292, 418 S.E. 2d 738 (1992), the West Virginia Supreme Court of Appeals held:

> [W]here a defendant asserts that the plaintiff's damage verdict is excessive, before considering such assertion, we will examine the record to see if the defendant made a reasonably diligent effort to contest the damages. From a review of this record, we find that the power companies virtually abandoned any reasonable effort to contest or properly object to the plaintiff's damage evidence and arguments.

Id., 187 W. Va. at 310.

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4. Petitioner cites *Harmon v. Higgins*, 426 S.E. 2d 344, 346 (1992) as authority for the point that punitive damages are not available under the West Virginia Human Rights Act. That issue was not before the state court in *Harmon* and the cite by petitioners is *dicta*. The other case cited by petitioner, *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189 (S.D. W. Va. 1986) is the federal court's interpretation of state law and is not consistent with *Alkire, Mayer, Harless, Mace* and *Dobson*.

In the case at bar, petitioner was not reasonably diligent in contesting damages (*see, e.g.*, 9/13/95 Tr. at 48-51, Respondent's App. E), did not present any contrary evidence to the jury regarding the wealth of the company, did not make any effort to explain the wealth of the company, and did not present any argument either during trial or at the post-trial motion stage regarding the company's wealth.

Petitioner objected to the lower court's jury instruction on punitive damages solely on the following basis: "Was objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury." (9/14/95 Tr. at 80, Respondent's App. C). Petitioner made no objection to the trial court's punitive damages instruction on the basis that it was an incorrect statement of law, and, thus, waived any objection to the form and substance of the punitive damage instruction. As the West Virginia Supreme Court has often repeated,

> [a] party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.

Horan, 189 W. Va. at 626, *quoting Roberts v. Powell*, 157 W. Va. 199, 207 (1973).

Whether petitioner in this civil action *should have* raised constitutional issues below is not a Due Process concern. The Due Process concern is whether the petitioner had the opportunity to raise constitutional issues. Petitioner had many opportunities to raise constitutional issues but failed to do so.

III.

PETITIONER RAISES NO IMPORTANT CONSTITUTIONAL QUESTIONS

BMW and *TXO* require that the procedures used in assessing and reviewing punitive damages impose meaningful constraints on the fact finder's discretion. In this case, the jury was properly instructed on the issue of whether to award punitive damages and upon how punitive damages should be calculated. The award of punitive damages was then fully reviewed by the trial court to ensure the reasonableness of the award based on facts of record and as presented during post-trial motions. The trial court's findings of fact and the record were again reviewed by the state appellate court with the benefit of this Court's decision in *BMW* to ensure compliance with Due Process principles and to guard against excessiveness. Given the failure of petitioner to raise and preserve for review federal questions now presented, the state appellate court sensibly issued a *per curiam* decision.

In *Browning Ferris Industries*, 492 U.S. at 278, the Court held that

> . . . where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

Petitioner by necessity is asking this Court not only to review the punitive damage award and the *Garnes* factors, but to disregard a host of West Virginia cases concerning the need to preserve error.

Petitioner argues that Congress, some state legislatures, and certain courts protect out-of state corporations from the

"problem" of punitive damages by capping punitive awards, bifurcating liability and punitive damage determinations, providing "more detailed guidance" to juries on punitive damage concepts, etc. Petitioner's Writ, p. 25. Given that in this case petitioner did not seek to bifurcate liability[5] and punitive damages, did not object to the substance of the trial court's detailed punitive damage instruction, did not participate in the *Garnes* review, and in fact the state supreme court reduced one of the punitive damage awards to a five to one ratio, petitioner's argument that West Virginia provided it with no protection from "capricious punitive damage awards" is truly misplaced. *Id.* West Virginia law provides ample protection. Petitioner just failed to avail itself of that protection.

At best, petitioner's argument is simply that the state appellate court correctly stated but misapplied *BMW* based upon the record preserved and presented. The fact intensive analysis performed by the trial and appellate courts in this case during their separate reviews of the punitive damage awards is not readily transformed into guiding principles of constitutional magnitude, particularly where constitutional issues were not raised in the first instance.

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5. Bifurcation is an option under West Virginia law, *see Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E. 2d 624 (1992).

CONCLUSION

Respondent respectfully suggests that this Court decline petitioner's writ of certiorari because no important federal issue is preserved or raised therein.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGE 53

[53] ahead, sir, and make your motion?

MR. BENTLEY: Your honor, with regard to any back wages extending back from the date or from October 12, 1994, would be our position that the Plaintiff has failed to make a prima facie case showing that there was any demand made by the Plaintiff to return to work during a period prior to that date. And that there was no return to work authorization provided to her by her physician as her physician testified, both of those things being required before the employer is required to consider reinstatement — reemployment. Doctor Troup said in his testimony that he had not prior to November 4 of '94 provided her with any return to work authorization. She said in her testimony that she did not get any return to work authorization prior to that date. So I think those things, combined with the law found in 23-5(A)-3 would preclude back wages prior to — as early as October 12th. Probably not before November 4th of '94. And I would ask that you direct at this point that the jury not be permitted to consider back wages prior to that date.

COURT: Mr. Waddell, anything?

MR. WADDELL: I am indemnified so I don't think I should take a position on that argument, no matter what I feel personally.

APPENDIX B — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGE 188

[188] MR. BENTLEY: No objection, Your Honor.

COURT: Mr. Hammer?

MR. HAMMER: No objection, Your Honor.

COURT: Okay. The rest of the instructions we will take up tomorrow morning at 9:00 o'clock. Now we are at the stage where I would anticipate that there would be motions made. Mr. Bentley renews his motions for the grounds previously stated and says that it is all the more obvious now that the Court should have granted it earlier.

MR. BENTLEY: That's correct, Your Honor.

COURT: And Mr. Waddell, do you wish to be heard on that point?

MR. WADDELL: On his motion, Your Honor?

COURT: Yeah.

MR. WADDELL: I don't believe so.

COURT: You have been so neutral in this case.

MR. BENTLEY: With notable exceptions.

COURT: Mr. Hammer, do you wish to add anything further to the position that was stated earlier at the benchside by either yourself or the colleague, whoever had leave to approach the bench at that time?

MR. HAMMER: I don't believe there has been any additional evidence on that point for the Defendant's . . .

APPENDIX C — EXCERPTS FROM 9/14/95 TRIAL TRANSCRIPT, PAGE 80

[80] MR. BENTLEY: We objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury.

MR. HAMMER: Plaintiff objected to Defendant's Instruction Number 1 on the basis that it is not an accurate statement of the law insofar as statements in the Workers Compensation report of injury Form 123 to reflect that the employer does not dispute the compensability of the injury is inconsistent with the statutory language. Plaintiff objected to Instruction Number 2 on the basis that the word only is not in the statute. And in fact there is another basis listed in the statute — strike that. Simply say that the word only is not listed in the statute and the implications arising from that may improperly confuse and mislead the jury in believing that the fact that someone is granted temporary total disability benefits means that they were unable to work. Plaintiff objected to Defendant's proposed Instruction Number 4 on the basis that it was contrary to the law. The case cited of Walk v. State Compensation Commissioner addresses the issue of permanent partial disability. It does not say the temporary total disability benefit compensation is intended to take the place of the ability to work. That is contrary to the . . .

* * *

APPENDIX D — EXERPTS FROM DEFENDANT SHEETZ, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR A NEW TRIAL AND/OR REMITTITUR AND MEMORANDUM IN SUPPORT THEREOF, PAGES 19-21

[19] picture. The recovery for emotional distress as well as other compensatory damages such as lost wages should adequately compensate the plaintiff." Id. at W. Va. 692, S.E.2d 703.

There are instances where emotional distress damages *and* punitive damages may be appropriately awarded. "[W]here the employer's conduct is wanton, willful or malicious, punitive damages may be appropriate." Id. at W. Va. 692, S.E.2d 703.

In *Mace v. Charleston Area Medical Center Foundation,* 188 W. Va. 57, 422 S.E.2d 624 (1992), our Court recalled several examples of the kind of egregious conduct which would make punitive damages appropriate in a case where emotional distress were awardable.

"[S]uch a situation may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment." *Mace, supra.,* 188 W. Va. at 67, 422 S.E. 2d at 634.

In *Mace,* the court found no such conduct and overturned the punitive damage award. No such conduct was presented by Plaintiff in the instant case. To the contrary, she was considered and spoken of as a good employee and Plaintiff testified that she was treated well by her fellow employees and managers, one of whom she testified was her good friend.

Of course, the reasoning — the law — which our Court has

developed in this regard applies just as appropriately to the damages awarded attendant to the three directed counts. The emotional distress damages of $120,000.00 are appropriate, as tort damages.

But, what of the $1,575,000.00 punitive damage award? There was no mean-spirited, malicious conduct on the part of the Defendant toward the Plaintiff. As the Court noted at trial, at worst, Defendant's actions were "really stupid." Justice Richard Neely, in our Supreme Court's now famous *TXO Production* case, defined the really stupid defendant thusly: ". . . those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness — in most cases caused by a foul up in the middle of some corporate bureaucracy . . ." *TXO Production Corp. v. Alliance Resources Corp., et al.*, 187 W. Va. 457, 475, 419 S.E.2d 870, 888 (1992).

There was no evidence presented at trial that the Defendant's actions were willful, wanton, malicious or mean-spirited.

The mental distress and punitive damage elements constitute double recoveries with regard to both the directed verdicts and the retaliation claim. Without the malicious, mean-spirited characterization, punitive damages were and are inappropriate in this case and must be a part of the remittitur sought by the Defendant herein.

Punitive damages are inappropriate in this case where there was an appropriate claim for mental distress but, without any physical trauma. "[A] jury may weigh the defendant's conduct in assessing the amount of damages and to this extent emotional distress damages may assume the cloak of punitive damages." *Harless, supra*, at 701.

Additionally, the punitive damages award totaling $2,699,000.00, in this case is clearly excessive under any analysis. Even if a punitive award were appropriate under the "really stupid" characterization, as the *TXO* Court opined, "In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is roughly five to one." *TXO Production Corp.*, at W. Va. 476, S.E.2d 889. The compensatory damages awarded by the jury in the instant case cannot be termed negligible. The award was large and the emotional distress aspect made the Plaintiff more than whole. Accordingly, even if the facts of this case were such that punitive damages were appropriate for consideration, they would necessarily have to be considered closer to the multiplier of *one* than to *five* (times the compensatory damages).

The instant case is one in which there was no physical trauma to the Plaintiff but, there was alleged emotional distress. The four claims out of which the damages flowed, if they ultimately stand, can only be found to have been caused by the careless and negligent actions of the defendant. They all, however, carry indicia of intent. Accordingly, these tort claims appropriately included, as an element of damages, emotional distress.

Emotional distress, in such cases, assumes the cloak of punitive damages and makes punitive damages duplicative and inappropriate to this type of case.

Absent evidence of maliciousness or mean-spiritedness, punitive damages cannot be recovered. There was no such showing made by the Plaintiff in the instant action. Therefore the Court is requested to grant the Defendant's motion for

remittitur and diminish the jury's verdict by the full amount of the punitive damages, $2,699,000.00.

The jury awarded $52,281.00 for lost back wages. Wage replacement in the total amount of $31,395.00 from October 1, 1992 through September 13, 1995, has been paid in the form of temporary total disability payments to the Plaintiff. The verdict must be reduced by this amount. There clearly will be additional benefits paid to the Plaintiff which should reduce future wage loss, if such future loss is sustained.

In addition, the jury awarded double future damages and futures in excess of that proven. Since such damages must be proven to a reasonable degree of certainty, Defendant requests the verdict be reduced by the entire $52,281.00 award. At the very least, however, the Court should . . .

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APPENDIX E — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGES 48-51

[48]

* * *

BY MR. BENTLEY:

Q. Mr. Lantzy, how are you?

[49] A. Pretty good.

Q. I'm Norwood Bentley. As you have indicated, you have done work for my firm before, so I won't quibble with your qualifications. What with regard to the future wages that you set forth, and I think you said those were Twenty-Four Thousand Four Hundred Ninety-Seven Dollars?

A. That's correct.

Q. Is that the present value?

A. That's correct. No inflation has been taken into consideration.

Q. And so you didn't add any inflation into that?

A. That's right. They were all calculated at $5.85 per hour.

Q. Now the total revenues that you have put up on the board, those don't mean profits? Those are not all moneys that are available to Sheetz, what Sheetz has available to it to do whatever it wants to at their discretion?

A. That's correct. It is more closely that would be the net income that we had talked about.

Q. That's right. And you don't really learn a whole lot from total revenues?

A. If you don't make the total revenues, you don't make the bottom line.

[50] Q. But you don't learn a great deal about what can be done with that money that — the figures that you want to look at for purposes of a case like this are other figures, is that right? Other figures that you have mentioned?

A. I mean, it depends on what you are looking at.

Q. Well, if you are looking at discretionary money to do something with, you wouldn't look necessarily at total revenues?

A. That's correct.

Q. I only have one other question, and that is with regard to the insurance benefits that you figured in, I wanted to make sure I understand — understood properly how you figured that in. I understood I thought you to say that you used the same level of inflation for the increase in costs of insurance as you did for the increase in wage rate?

A. That's correct.

Q. And is that something that is done in your business all the time? Is that an equivalent rate?

A. There is a — the cost of health insurance back in '92 is less than it is in 1995, all right. So the question is, how much less.

Q. Right.

[51] A. The methodology I used was based on the wages. That was just the methodology coming up and saying there is no question that it is less in '92, how much less. And I used the increase in wages as an indication of the inflation.

Q. Did you look at actual insurance rates in '92?

A. No.

Q. Do you have any literature or basis on which you made the decision to use the same inflation rate for both?

A. No.

Q. You just assumed that?

A. That's correct. It is less.

Q. So that if the rate were different for the increase in costs for insurance, then the actual numbers would be different than what you put on the board?

A. That's correct. That's correct.

MR. BENTLEY: Thank you.

MR. WADDELL: I'm here. I have no questions.

Appendix E

MR. HAMMER: Nothing further, Your Honor.

COURT: May I release the witness?

MR. HAMMER: Please.

COURT: Thank you, sir. Plaintiff may call her next witness.